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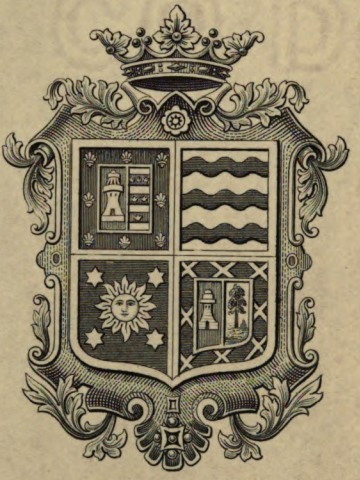

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INTERNATIONAL LAW.

AN INTRODUCTORY LECTURE

DELIVERED 17 OCTOBER, 1888,

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IN THE UNIVERSITY OF CAMBRIDGE

BY

J. WESTLAKE, Q.C., LL.D.,

WHEWELL PROFESSOR.

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INTRODUCTORY LECTURE ON INTERNATIONAL LAW.

THE subject of International Law—I suspend for the moment the question how far it can be considered a science—comprises, as commonly understood, all that can be said with some degree of generality about human action not internal to a political body. Let it be the mutual action of political bodies, let it be action between one political body and one or more members of another, or let it be the action of a political body towards barbarians or savages not grouped in any such body—wherever such action can give rise to any general statement or judgment, there we have matter for International Law. Of this subject the department which stands lowest in philosophical order is descriptive, presenting a picture of facts which might be called geographical in a large sense of that term. It comprises a knowledge of the actual distribution of the world into states, with their boundaries, the statistics of their material strength and, so far as such can be obtained, of their moral strength, and their mutual relations as being either wholly independent or more or less subordinate one to another. Even when they fall within the class of independent states, the description is not complete till we have added a knowledge of the treaties which exist between them, such as those of alliance or neutrality, those which pledge them to take or abstain from taking any particular course of action in given contingencies, or those which establish on the territory of one an easement or servitude in favour of another. These are ideal boundaries, comparable to physical ones, and transgressed with equal ease, perhaps with less inconvenience when it is considered how unwisely they are often laid down. Outside the system of states, the various uncivilized or half civilized races

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have to be taken into account, with the several degrees in which they approach to having regular governments, and there would then be completed what might be called a Domesday Book of the world. It would be a very natural question to ask about such a book, supposing it to lie before us, whether its contents can possess any of that quality of generality which is required for placing them among International Law, even in the wide definition of that subject which I have given. Should we not be looking only at a mass of individual facts, constituting indeed a necessary apparatus of preliminary knowledge, but being the introduction to International Law, not a part of it? I answer that the facts include in themselves generalities which any proper description of them will bring out. They present us with our first general notions, and disclose to us certain widely spread habits of action. Thus, the international idea of a state has to be abstracted from the facts about more or less independent political existence, and the comparative study of treaties throws light of the highest importance on the ways in which states tend by their nature to act. The descriptive part of International Law has therefore a real claim to be a true part of our subject.

Above the descriptive rises the more purely philosophical part of International Law. This may be said to consist of the rules of conduct which states deem themselves entitled to claim the observance of from outsiders, and entitled or bound to observe for themselves towards outsiders, whether, as before intimated, the latter are foreign states, individual foreigners, or races not possessing fully developed state organization. I do not say, the rules of conduct which states deem themselves entitled or bound to observe, or to claim the observance of, in the absence of treaty, because among the rules of conduct to be considered are those which determine or limit the binding force of treaties. And the rules of conduct which thus present themselves as matters of claim have to be considered from three points of view—from one point of view, as an existing body of more or less authoritative doctrine: from another, as a body of doctrine manifestly

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imperfect, and giving rise to interesting and difficult questions about the nature of the amendments that may be desirable, and about the methods to be pursued for attaining such amendments: from a third, as a body of doctrine having a history, the study of which is at once gratifying to a liberal curiosity, and necessary for understanding the doctrine itself and for appreciating the possibilities of amending it.

Such is the subject which I have been called to the responsibility of professing. Evidently it does not possess the unity of mathematics or of a natural science. It does not develop the consequences of any principles so simple and clear as time and space, or as chemical or electrical laws. But it has a unity of its own, in its reference to a great department of human action. If International Law had been regarded in the way in which I have presented it at an earlier stage in the history of our language, when what is now called political science was commonly spoken of as the art of government, the practical rather than theoretical nature of its unity would probably have caused our subject to be described as an art and not as a science. At that time however the view taken of international relations was profoundly tinctured by notions about a law of nature, which, if they could be sustained, would make the theory of those relations a science in the strictest sense. And now, while the law of nature has retired into the background of English speculation, the name of science has come to be used so much more widely and loosely that I will venture to claim it for International Law, even in that comprehensive and popular acceptation of it which I have put forward.

But if the title of science is conceded, that of law may still be disputed. In a country in which legal theory has been so deeply tinctured by the writings of John Austin, and in a university in which those writings are recommended to students, it will be expected that I should declare how I stand with regard to his classification of my subject as belonging not to law but to morality. Sir Henry Maine has already protested on historical grounds against the

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restricted meaning to which Mr Austin wished to confine the word "law." I will take up the question on analytical grounds, and with a similar result so far as our present subject is concerned, for on those grounds also I see no sufficient reason for preferring the name of positive international morality, proposed by Mr Austin, to that of international law.

Let us consider what are the essential characters of a rule of conduct. First, there is the character of generality, which consists in its applying to a whole class of particular actions. Secondly, there is the character of precision, which consists in its being possible to state the rule so clearly that there can be no mistake about the actions to which it applies, or at the utmost so that mistake is possible only with a regard to a few cases lying on the limits of the class. Thirdly, there is the character of observance, which consists in the rule being habitually followed in practice. I say habitually, and not invariably, because invariable observance is not attained by the laws of the best ordered state. They are often broken, though their breach may be punished or redressed, and breach, even followed by punishment, is not observance. Fourthly, there is the character of recognition; which on the part of those who according to its terms ought to observe the rule, consists in their recognizing it as not leaving them much choice in the matter, and on the part of those towards whom according to its terms it ought to be observed, consists in their fully expecting its observance. Where these four characters are present, it seems to be admitted on all hands that we have a positive rule. That admission is made in the very name of positive international morality which Mr Austin gives to so much of my subject as is composed of rules of this kind. Perhaps we may say that the characters of generality and precision make a rule, and that those of observance and recognition make it a positive rule. And the general sense of those who have framed and employed our technical phraseology on this subject has been that a positive rule of conduct may be called a law, as is seen not

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only in the term International Law but also in the much older term Law of Nations.

Why then does Mr Austin confine the name of law to the law of the land? Why does he insist that such rules as those, for example, which govern diplomatic intercourse, rules as general, as precise, as well observed and as fully recognized as the laws of this or of any other country against theft—why, I ask, does he insist that these are not to be called laws? We all know that it is because they are not laid down, or as he likes to call it set, by a sovereign political authority. That is a distinction, no doubt, but it appears to be one of which it is easy to overrate the importance. A rule set by a sovereign political authority is contained in a statute-book, or in writings or traditions which are authoritative in the eyes of a judge, whose decisions will in their turn be carried into effect by the executive department. A rule which forms part of International Law is contained in writings, traditions or sentiments which are authoritative in the eyes of civilized men, whose judgment on its breach will receive a pretty effective execution by the force, or at least by the disapprobation, of the states concerned. These are differences affecting the evidence which is to be given of the existence of a rule, the authority which imposes it, to a certain extent also the motives of those who observe it, for though in both cases the motive for observance is a sense of right supplemented by a fear of consequences, yet the consequences of breaking a national law and an international one are apprehended from different quarters. But surely, in a formal classification of rules irrespective of their contents, the broadest distinction between them lies neither in the evidence for them, nor in the authority which imposes them, nor in the motives of those who observe them; it lies not in how they come to be rules, but in their operation as rules, in the uniformity of their observance and of the expectation which attends it; in short, in their being or not being positive rules. It may be objected that few rules will attain any very solid character of precision or of observance where

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there are neither judges to pronounce on them nor a political executive to enforce them, and it cannot be denied that there is much truth in this. But if it be the fact that a large part of our subject is not likely to acquire a good title to the name of law till international relations have been more strictly organized, that is no reason for denying the name to such parts of it as already present the fully formed character of positive rules.

Again, Mr Austin's classification does not possess, and indeed he did not claim for it, the merit of bringing the use of the term law in the jural or moral sciences into any nearer accord with its use in the exact or in the natural sciences. There is a barrier of meaning, for ever impassable, between the laws of the exact or of the natural sciences and jural or moral laws. The formula of the one is "this is"; the formula of the other is "thou shalt." The one point of resemblance between the two lies in the matter of uniformity. The statement both of a rule of conduct and of a law of the exact or natural sciences applies with generality to all the cases which fall within the terms used; and if it be a mathematical law, or one of the natural sciences, its observance is no less uniform than its statement is general—a breach, if one could be proved, would only lead to the conclusion that what had been thought to be a law was not a law. A rule of conduct, on the contrary, let it be enforced by never so great and absolute a political power, is from time to time broken, though under penalties; but unless there were a near approach to uniformity in its observance, it would not be reckoned as a positive rule. But whether we look at generality in the comprehension of cases within the terms used, or at uniformity in the truth of the statement as applied to the cases so comprehended, it can hardly be doubted that it was their resemblance in the matters of generality and uniformity which in some way or other led to the rules of nature and the positive rules of conduct being equally called laws. What that way was, whether it was the same in the history of all languages which possess words having the same or an analogous extent of meaning to

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that of the word "law" in English, whether in any language the law of conduct or the law of nature was the first entitled to the common name, how far in the case of any language the notion of a lawgiver accompanied that of a law in the minds of those who first used the common name for either kind of law: these are highly interesting questions of philology and psychology. But, however they are answered, the fact remains that if the several senses of our word "law" be regarded independently of what they may connote in the minds of different persons, the one common point in their denotation is that at which they touch the notions of generality and uniformity. And when all positive rules of conduct are held to partake of the nature of law, this clue of meaning is more faithfully followed out than if we impose on positive rules of conduct, before we call them law, the additional condition of their being set by a sovereign political authority.

It will have been seen that I do not claim the name of law for any international rule, taken separately, of which the precision and the observance are insufficient to rank it as a positive rule. But no other rule could enter into the positive international morality of Mr Austin, and therefore, as against his classification, the foregoing vindication of the name of International Law covers the necessary ground. It may still however be objected to the name of International Law, as applied in its ordinary extension, that the international rules which, taken separately, can make good their title to be law are too few in number to justify us in regarding them as the dominant parts of the science, and allowing them in that character to determine the appellation of the whole. My answer to this is—first, that the real unity of the entire subject as a department of human action is such that a comprehensive name for it is indispensable: secondly, that the most extensive part of a subject is not necessarily the best entitled to give that name, but a claim of no lesser value may be urged in favour of that part which is the most perfect in scientific form: thirdly, that in the gradual improvement of international relations the precision and observance of

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rules is constantly on the increase, and that therefore those international rules which may already be ranked as law are typical of the subject, in that they are the completest outcome of a tendency which pervades the whole. I shall then, with some confidence, employ the name of International Law for the entirety of the wide and varied department of knowledge which I have indicated, nor can there be any doubt that the revered founder of this chair intended the name in no narrower sense. He specially directed the attention of his professors to the establishment of such rules and the suggestion of such measures as might tend to the extinguishment of war, and thereby showed that he looked down the stream of time to the day when the domain of law should be ampler and better fortified, and embraced under the name of International Law all that the straining eye can distinguish with any degree of clearness on this side of the unknown horizon.

I pass with pleasure from a controversy on a name to the question whether any principles can be found that may guide us in discussing the rules of International Law: principles by which we may accord those rules our praise or our blame where their positive existence is clear, by which we may choose among them where their positive character rests on disputable evidence, and by which we may determine the amendments or enlargements of them that ought to be advocated. Before we try to answer this question, it is necessary to come to an understanding as to the sort of principles of which we are in search. First then, they must not be in contradiction to the principles of morality, but they cannot be identical with those principles. We are dealing with rules either enforceable, or which it is proposed to make enforceable, by human authority more or less organized and regular in its action, while, by universal acknowledgment, a large part of morality is only suitable for being left to the individual conscience, corrected at the utmost by the irregular and often ineffectual censures of opinion. Secondly, the principles which we seek, as marking the boundary between the morally right and the enforceable, must bear

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the same relation to the rules of International Law which what Bentham called the principles of legislation bear to national law. Each may be described as the sum total of the considerations which it is deemed proper to invoke upon a question of maintaining or altering the positive law, so far as those considerations can be reduced to a general form. It may be well, before going further, to fix our ideas by quoting concrete examples, in each department, of the cases which arise for the application of such principles. Take first the department of national law, or internal law, to use the term which Bentham proposed as correlative to international. It depends on principles of legislation what extent shall be given to the jural notion of fraud, for instance, as to the fulness of the disclosure which a vendor shall be required to make to a purchaser. In discussing the sale of alcoholic drinks, it depends on principles of this class what balance the law shall strike between sobriety and liberty. In discussing the expropriation of property for a public purpose, it depends on principles of this class whether the owner shall be paid as an unwilling vendor, as a willing vendor, or even not at all, on the ground that other property of his will be so benefited by the public purpose concerned that on the whole he will not be a loser. You see how such questions involve the extent to which candour, temperance, public spirit, are not merely moral duties but are proper to be humanly enforced; and if no answers possessing the quality of generality in a sufficient degree can be given to them, there may be carefully considered legislation, there may be good legislation, but in the proper sense of the term there can be no principles of legislation. So, to give examples in the department of International Law, there may be questions about the responsibility of a state for the acts of its subjects, or the responsibility of subjects for the acts of their states; about the balance to be struck between the right of self-preservation attributed to a state and the duties which would be incumbent on it if no right of self-preservation could be opposed to them; about the force or fraud which may vitiate a treaty in its origin, or the alteration of circumstances which

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may authorize the plea that it is no longer applicable. Here too, in the last analysis, we have to do with the limitations to which the actions of men ought to be subjected at the hands of their fellow men, and if no answers possessing the quality of generality in a sufficient degree can be given to such questions as these, there may be carefully considered International Law, there may be good International Law, but there can in the strict sense of the term be no principles of international legislation.

The search after principles of this kind, jural as distinguished from ethical principles, has engaged many minds, but it cannot be said that either in the internal or in the international department it has been crowned with generally acknowledged success. On the other hand, the existence of a sentiment of jural right, distinct from the sentiment of ethical right, is one of the most persistent facts in human nature. If the principles could be found, they would explain that fact to the understanding. Whether they are found or not, the sentiment exists, call it jural right, justice, political justice, or what you will; and in most of the great languages it is difficult to speak of law without implying that it is the embodiment of such a sentiment. Thus a particular rule may be a *lex* in Latin, a *loi* in French, a *gesetz* in German, but law in general is *jus, droit, recht*, words in which, whatever may be their etymology, the notion of a rule is only admitted along with that of jural right. To put it otherwise, such words as *jus, droit, recht*, if they are used of rules, imply also, in the average apprehension of the men who use them, a standard of right by their conformity to which the rules must be judged. To a Frenchman, German or Italian, *le droit anglais*, or the corresponding term in the languages of the others, carries the sense not merely of the law of England, but of the English embodiment, more or less adapted to the circumstances of England, possibly more or less mistaken in such adaptation, of a general standard. *Le droit international*, or the corresponding term in the other languages, carries the sense not merely of International Law, but of the embodiment existing among states, and possibly

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the more or less mistaken embodiment, of a general standard. The simple meaning which we attach to the word "law" can only be got by a qualification, *le droit positif, das positive recht.*

That our word "law" does not carry this connotation of "right" is, of course, immediately due to the fact that "law" and "right" are, with us, two distinct words, while *jus, droit, diritto, recht,* each mean both. But why have we at present this distinction of words, which it is well known did not exist in the older stages of our language? I cannot help thinking that the fact is due, at least in part, to the independent position which the law of England early assumed by the side of the Roman law, which must inevitably have made Englishmen less prone than others to assume the universality of any discoverable jural principles, more inclined therefore to emphasize the distinction between law as a positive institution and jural right as an ideal. But, however it arose, the emphasis which our language has long placed on that distinction has had, internally, the beneficial effect that the duty of respect for law has been placed on its proper grounds, and has been the less liable to be undermined by the discovery, which in every country must be sometimes made, that the law is at variance with the sentiment of right. Internationally however, both the statesmen and the theoretical writers of England have been too apt to forget that half the reasons for respecting law as a positive institution rest upon the existence of a legislature to correct it, and of a government to enforce its reciprocal observance till corrected. Where these are absent, other means must be taken to prevent the law from falling too far behind the sentiment of right, growing as that sentiment does in correspondence with the growth of society. This is the justification of revolution, when a country is cursed with a system incapable of being legally reformed; and this, as between states, makes it the duty of governments to cooperate in bringing the positive rules of International Law into accordance with the standard set by the best jural ideal of the time. Sooner or later, that ideal will vindicate itself against all opposition. It will not in the long run be argued with practical success that, because a rule

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has been once acknowledged, it continues to bind until it has been changed by the unanimous consent of the states concerned. If, to us, International Law is a body of rules once acknowledged and not formally repealed, we must not forget that, to most others, *le droit international* is only binding so far as it is a tolerable approximation to an embodiment of international right. And I would point out the rights and duties of neutrals in war as one of the fields in which it may be necessary for Englishmen to bear this in mind more carefully than perhaps they have always done.

I spoke just now of the growth of society. Let me ask you to consider what that means, and how it is connected with our subject. The very notion of a jural right as distinct from a moral one, that is, of a right which men will enforce as distinct from one which they will feel but not enforce, implies a society between the members of which it serves as a *modus vivendi*. Before men can consciously possess such a notion, they must have lived together in bonds which are not only valuable to their interests but which have moulded their sentiments, bonds to preserve which they will concede much to each other. But such bonds are not created aforethought. Men did not construct society, nor do they now modify it, with a preconceived idea of the rights they shall have under it. Its construction and modification are the results of an inconceivable number of individual actions, performed in obedience to individual impulses. Men live their lives, they marry and rear their children, buy and sell, are generous and selfish, fight and make peace. They do all this within the limits of their political organization, if one exists, and outside any such limits. All the while, by the very force of doing so, they are building up organizations that realize the average ways in which their mutual friction and limitation have led them to look at their mutual relations. They may be compared to bees or coral insects, so far as they produce harmonious results which they did not contemplate. But their action as individuals differs through a much wider range, so that the general result, if it be a total, partakes also of the nature of an average. Still further are they unlike bees and

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coral insects, in that they possess the power of looking from the outside at their accomplished work, and recognizing in it the aims towards which they were blindly struggling. And further still it is the prerogative of man that no accomplished work of his has yet been final. When the jural idea comes into sight in the social structure, national or international, so far as it has been realized, it is seen at once to have reference to the past rather than to the future, because the stirrings of a new formation are already felt beneath. To take one example among a thousand, slavery was not erased from the laws of Western Europe till the slaves had been freed by private charity, and as soon as it was erased the question of the poor took its place. Or to take an example in which the old idea is not simply built on but threatened with modification, no sooner is the independence of states vindicated from an Austrian or a French world empire, than the question begins to loom among thinkers, how far and in what manner it may be necessary to limit that independence by a parliament of the world, and statesmen begin practically to limit it by European pentarchies and congresses. Hence that contrast to which I have already alluded, between the perennial nature of the jural sentiment and the fruitlessness of the search for universal principles of legislation.

Comparing international with internal relations, there is an obvious reason why in the former the jural sentiment should be weaker than in the latter, and its embodiment in jural principle much less clearly apprehended, even with reference to the degree of advancement already realized in international society. Through all the gradations of the family, the municipality and the state, the social feeling is developed and strengthened by the habit of action in common for common ends. As soon as the boundaries of the state are passed, common action ceases, or is limited to rare occasions, like those of active alliances, or to matters conducted by officials, like international posts and telegraphs. The very existence of foreign nations is chiefly brought home to the mass of mankind by some opposition of policy or rivalry of interest, it is well if it be not by war. Would it not

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be wonderful if the jural idea were not weak and obscure in proportion to the weakness and obscurity of the social bond to which it corresponds? I must caution you, then, not to expect too much from my subject. Surely, in international principle, we have cause to be thankful if we can see but a little way.

To see our way at all in such a subject, a certain philosophical temper and a certain practical temper appear to be required. The philosophical temper I will venture to call the inductive one, for in this home of the inductive sciences we have perhaps the right to affirm that from their study has flowed a habit of mind, the application and usefulness of which reach far beyond the possibility of employing any process which can be formally described as inductive logic. This habit of mind may be recognized by its being more disposed to take measures from facts than to bring ready made measures to them. It is the critical temper in philology and literature, and the historical temper in jural and political investigations. Not indeed historical in the narrow sense that would measure what ought to be by what has been, for together with the external fact the tendency, which is no less a fact, has to be taken into account, and what has been and has ceased to be is presumably what it was fit should cease. The tendency indicates a need, but the external fact which has existed is not necessarily, or even presumably, the mode of satisfying that need which is best for us at the present day.

The practical temper that I would inculcate is that which will result if each one of us tries always to bear in mind his own personal responsibility in international affairs. The strong insistence with which most writers on the subject have dwelt on the artificial entity of the state, the sharp contrast which, of late more especially, they have drawn between a state and its subjects, may easily have an evil influence on a student of International Law, and on the public so far as it is affected by the tone of thought among such students. It may weaken the sense that the action of a state is the action of those within it who help to guide it, whether in a public capacity or even by merely expressing an opinion; nay, that

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in a lesser degree it is also the action of those who suffer the others to guide it. The influence of the same tone of thought will again be evil if it allows us to forget that not only is the action of our state that of ourselves, but that those towards whom it is taken are also men like ourselves, though they may be veiled from our eyes by the interposition of another artificial entity. I do not say this in the interest only of those improvements in International Law which the future may have in store, although the condition of their being worked out is that we shall think more of what is human in the matter and less of what is technical. Nor do I wish only to hold up to your eyes the physical and moral suffering caused by war to individuals, though these are important enough. I deprecate the ignoring of personal responsibility quite as much with a view to the effect which the conduct of a great state may have on the destinies of other populations, especially of those which, as possessing less power or a lower civilization, are exposed to be most seriously affected by our action or our abstinence from action, while least able to help themselves. There can neither be sound International Law nor sound international politics, nor sound treatment of inferior races, without a sense of duty; and a sense of duty will not be roused towards abstractions, nor by looking at abstractions. Hence I have not chosen to define International Law as the science of the rules prevailing between states, and to treat as subsidiary the questions of how far those rules are applicable to semi-sovereign states or to half civilized or uncivilized populations. I have chosen to put in the front the idea of action, which carries with it the ideas of duty and responsibility, and to define International Law as dealing with all human action not internal to a political body. From this point of view the subject is seen to have a real unity, though the rules of action will naturally differ with the circumstances.

Now a final word on the position of this study in the university. No one will imagine that a study, from which it has been necessary to caution you not to expect too much, is one of those that can be recommended with the object of

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training the mind. It is rather one which demands a mind already to some extent trained. But while most of the subjects which make that demand belong to special instruction and not to a liberal education, I venture to think that International Law ought not to be considered as belonging to specialists. To what class of specialists indeed should it belong? To professional lawyers? But the parts of it which come before courts of justice, as the law of maritime prizes during war, bear no large proportion to the whole. Or does it belong to lawyers, as being conversant with the interpretation of contracts, and with the rules of national law which are borrowed in International Law? But this very borrowing requires to be controlled by a larger view than belongs to the professional lawyer as such, which his predilection for the rules of which the application is discussed may sometimes be an obstacle to his attaining. Or are the privileged specialists of the subject to be found in the Foreign Office, including the potential Foreign Office of the opposition, and in the writers who watch and criticize their proceedings? When we have got as far as this, and have included, as we shall logically be bound to do, the public who ought to follow the writers with intelligent appreciation, we shall see that International Law is no more a subject for specialists than home politics are, nor can it be if the duty of the citizen is concerned with international action. And while, as a subject for study at the university, it differs favourably from home politics in its being comparatively independent of party spirit, the very fact that party motives do not bring it so continually under popular discussion makes it the more necessary for the university to draw attention to it. We have here the men of whom a large part will become, and all ought to become, interested participators in the international career and tasks which lie before the United Kingdom. It would be matter for regret if a too exclusive attention to the general training of their intellects permitted them to leave us without having been invited to reflect on the principles which may make that participation useful.

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